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No. 39

In the Supreme Court of the United States

OCTOBER TERM, 1930

RUSSIAN VOLUNTEER FLEET, PETITIONER

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the Court of Claims (R. 35–38) is reported in 68 C. Cls. 32.

JURISDICTION

The judgment of the Court of Claims was entered on April 1, 1929. (R. 39.) The plaintiff made a motion for a new trial, which was overruled on November 4, 1929. (R. 39.) The petition for a writ of certiorari was filed on February 3, 1930 (R. 39), and was granted April 21, 1930 (R. 41). The jurisdiction of this Court rests on Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

May a corporation which alleges that it is "a corporation duly organized under and by virtue of the Laws of Russia" maintain an action against the United States in the Court of Claims to recover compensation for the value of property requisitioned under the provisions of the Act of June 15, 1917, c. 29, 40 Stat. 182, 183?

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

These are printed in Appendix A, pp. 15–16, *infra*.

STATEMENT

The petitioner filed an amended petition in the Court of Claims alleging that it "is a corporation duly organized under, and by virtue of, the Laws of Russia." (R. 7.) That petition also makes the following averments:

The petitioner in January, 1917, acquired by assignment certain contracts for the construction of two steel cargo steamships, which contracts had previously been made between Norwegian citizens and the Standard Shipbuilding Corporation of New York. (R. 7–8.)

The United States Emergency Fleet Corporation, under authority delegated to it by the President pursuant to the provisions of the Act of June 15, 1917, c. 29, 40 Stat. 182, requisitioned these ships and the contracts therefor, and completed construction of the vessels. (R. 10–13.)

The Emergency Fleet Corporation, on March 5, 1920, fixed the compensation due petitioner on ac-

count of the requisitioning of the ships at $1,412,-532.35, which sum included refund of certain progress payments made the shipbuilder. Payment of this sum was authorized to whomsoever the Department of State should designate as properly and legally entitled thereto, but payment was withheld pending advice from the Department of State as to how and to whom the money should be paid. (R. 14.)

Paragraph 13 of the petition alleges (R. 15):

> Citizens of the United States are and at the time of and since the commencement of this suit have been accorded the right to prosecute claims against the Russian Government in the Court of that Government.

The plaintiff served notice that it proposed to take the evidence of certain witnesses. (R. 34.) The defendant moved to quash the plaintiff's notice of its intention to take this testimony upon the ground that the court below was "without jurisdiction of the subject matter of this proceeding." (R. 34–35.)

After argument the Court of Claims thereupon dismissed the petition. (R. 38.) The opinion of the court below averred (R. 35):

> It is stated in plaintiff's brief:
>
> "The plaintiff in this case is a corporation and citizen of the Union of Soviet Socialist Republics. The plaintiff has alleged and now offers to prove that a citizen of the United States is or was accorded the right to prosecute claims against the said Russian

> Soviet Government in its courts or against the Kerensky government in the courts of that government."

The court held that the suit was subject to the provisions of Section 155 of the Judicial Code (pp. 15–16, *infra*). It took judicial notice of the fact that this Government has not recognized the Union of Soviet Socialist Republics and that, consequently, a citizen thereof was not a citizen "of any government" within the meaning of Section 155.

A letter from the Secretary of State to the Attorney General, which is copied as Appendix B (p. 17, *infra*), shows that the Provisional Government of Russia, the successor of the Imperial Government of Russia, was recognized by the Government of the United States on March 22, 1917, and that according to the information of the Department of State the Provisional Government of Russia was overthrown by an armed uprising in November, 1917. The Government of the United States has not extended recognition to any régime established in Russia subsequent to the overthrow of the Provisional Government.

SUMMARY OF ARGUMENT

The Government submits the case to the Court on the opinion of the Court of Claims. Although we do not confess error, we are of the opinion that Section 155 of the Judicial Code is not applicable to this suit, which was brought in accordance with the provisions of the Act of June 15, 1917, to recover compensation for the requisition of property by

the United States. This Act does not mention Section 155, and we think it doubtful whether Congress intended to make the right to sue dependent upon the conditions set forth in Section 155. A case involving other statutes relating to suits in the Court of Claims supports the contention that Section 155 is not applicable. *Richmond Screw Anchor Co.* v. *United States,* 275 U. S. 331.

Moreover, there would seem to be grave doubt as to the constitutionality of the Act of June 15, 1917, as construed by the Court of Claims. The protection of the Fifth Amendment has been held by this Court to extend to aliens. And we believe there would be grave doubt as to the constitutionality of a statute which provided for the taking of private property of aliens without providing for determination of just compensation under supervision of some court, even in the case of nationals whose government does not permit the prosecution of such claim against itself. If this is so, such a construction of the statute should be avoided if its language will permit.

If Section 155 of the Judicial Code is applicable, we submit that the decision of the Court of Claims was correct. This Government has not recognized any régime which has been functioning as a government in Russia since 1917. We contend that it follows that if the petitioner is a citizen of Russia, it is not a citizen "of any government" within the meaning of Section 155, and that the courts in this country can not find that judicial remedies against the Russian government exist in Russia.

A further question may be suggested, and that is whether a corporation which purports to be a citizen of "the Union of Soviet Socialist Republics" has such a legal existence as to bring suit in any court. But we are of the opinion that this question is not now before this Court. The petition filed in the Court of Claims describes the petitioner as a corporation "duly organized under, and by virtue of, the Laws of Russia." As the record avers facts showing that it was in existence under the régime of the Imperial Russian Government, it can not be assumed without proof that it now has no corporate existence. A recent well-considered case held that such a corporation may bring suits in courts in this country. *Petrogradsky M. K. Bank* v. *National City Bank,* 253 N. Y. 23. The mere statement that the petitioner is a citizen of "the Union of Soviet Socialist Republics," in its brief, which is not a part of the record, would hardly seem to be sufficient ground for dismissing the case. Whether any corporation created by this so-called Republic can sue is a question which requires more information about the subject than can be obtained either from the instant record or judicial notice of political acts. Similarly, the question whether the instant suit is being prosecuted by persons having proper authority from the corporation, alleged to be entitled to compensation, is a matter which can not be determined at the present time.

ARGUMENT

I

IS THE SUIT OF THE PETITIONER SUBJECT TO THE PROVISIONS OF SECTION 155 OF THE JUDICIAL CODE?

The petitioner in the Court of Claims sought compensation for the requisition of a contract under the Act of June 15, 1917, (p. 16, *infra*), which provides that whenever the United States shall requisition any contract it shall—

> make just compensation therefor, to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code.

Section 24, paragraph 20, has no application to the instant case. Section 145 of the Judicial Code (p. 15, (*infra*) is the one giving the Court of Claims its general jurisdiction over claims against the United States.

Neither the Act of June 15, 1917, nor Section 145 of the Judicial Code contains any express ref-

erence to Section 155 of the Judicial Code (pp. 15–16, *infra*). That section provides:

> Aliens who are citizens or subjects of any government which accords to citizens of the United States the right to prosecute claims against such government in its courts, shall have the privilege of prosecuting claims against the United States in the Court of Claims, whereof such court, by reason of their subject matter and character, might take jurisdiction.

This section of the Judicial Code, as pointed out on pages 21–22 of the brief for the petitioner, was not a part of the original Act establishing the Court of Claims. It had its origin in the Act of July 27, 1868, c. 276, 15 Stat. 243.

The legislative history of the Act of June 15, 1917, throws no light upon the question whether Congress intended to make its provisions subject to Section 155 of the Judicial Code.

Richmond Screw Anchor Co. v. *United States*, 275 U. S. 331, construed a somewhat similar statute (the Act of July 1, 1918, c. 114, 40 Stat. 704), which gave jurisdiction to the Court of Claims in cases arising out of the unlicensed use or manufacture of patented articles by the United States. It held that the rights there given were not subject to the provisions of Section 3447 R. S., which prohibits suit against the Government by an assignee of a patent for prior infringement. There is a strong analogy between that case and the instant case.

The Act of June 15, 1917, may therefore be construed as not incorporating the limitations of Section 155 of the Judicial Code, and we are of the opinion that it should be so construed, in view of the fact that the construction of the Act of June 15, 1917, adopted by the Court of Claims, raises grave doubts as to its constitutionality. *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 408; *United States* v. *Standard Brewery*, 251 U. S. 210, 220; *Phelps* v. *United States*, 274 U. S. 341; *Richmond Screw Anchor Co.* v. *United States*, 275 U. S. 331, 344.

The provisions of the Fifth Amendment in regard to just compensation have often been said to require judicial determination. *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 327; *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299, 304; *United States* v. *New River Collieries Co.*, 262 U. S. 341, 343, 344; *Davis* v. *Newton Coal Co.*, 267 U. S. 292, 301. In *Bauman* v. *Ross*, 167 U. S. 548, 593, the Court said that the estimate of just compensation for property taken for public use "may be entrusted by Congress to commissioners appointed by a court or *by the executive.*" (Italics ours.) But this language was not necessary for the decision of the case and seems to be contrary to the later opinions just cited. If section 155 limits the right to pursue the judicial remedies granted by the Act of June 15, 1917, that Act would seem to be unconstitutional under these authorities.

It is well settled that the protection of the Fifth Amendment (p. 15, *infra*) extends to aliens. See *Wong Wing* v. *United States*, 163 U. S. 228, 238; *Li Sing* v. *United States*, 180 U. S. 486, 495. See also *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369, and *Truax* v. *Raich*, 239 U. S. 33, relating to the applicability of the Fourteenth Amendment to aliens. We know of no case raising the question as to whether protection of the Amendment extends to aliens who profess to be subjects of unrecognized governments, but it appears that the Russian Volunteer Fleet existed as a corporation under the Imperial Government and that its property was seized during the sway of the provisional government which the United States recognized (p. 17, *infra*). Unless the existence of such a corporation has ended because of revolution and exhibitions of power of the so-called "Soviet Republics" or has no life except by virtue of their decrees it can hardly be contended that this corporation was not entitled to the protection of the Fifth Amendment. But upon these questions the record is silent.

II

IF THE PETITIONER'S RIGHTS ARE SUBJECT TO THE PROVISIONS OF SECTION 155 OF THE JUDICIAL CODE, WE SUBMIT THAT THE DECISION OF THE COURT OF CLAIMS WAS CORRECT

The Provisional Government of Russia was recognized by the United States on March 22, 1917, and the Provisional Government of Russia was

the last government of Russia recognized by the United States. (*Infra*, p. 17.)

If the petitioner's rights are subject to Section 155 of the Judicial Code (*infra*, pp. 15–16), then the petitioner can sue only if it is a citizen or subject "of any government which accords to citizens of the United States the right to prosecute claims against such government in its courts." If the petitioner claims to be a citizen or subject of the last government of Russia which was recognized by the United States, then it can not show that that government now allows citizens of the United States to prosecute claims against it in its courts, for it is a fact of general knowledge, of which this Court may take judicial notice, that the courts of the last government of Russia which we recognized are no longer functioning. If on the other hand the petitioner acknowledges allegiance to and is a citizen of the present régime in Russia which has not been recognized by the United States, our courts can not say that it is a citizen of a government which allows our citizens to prosecute claims against it in its courts within the meaning of Section 155 because one of the attributes of a court is the sanction and authority of government and any such determination would conflict with the determination of the executive to withold recognition of the present régime in Russia.

In support of its contention to the contrary, the petitioner cites *Texas* v. *White*, 7 Wall. 700, *Thorington* v. *Smith*, 8 Wall. 1; *United States* v.

Insurance Companies, 22 Wall. 99; *Williams* v. *Bruffy*, 96 U. S. 176; *Baldy* v. *Hunter*, 171 U. S. 388.

III

OTHER POSSIBLE QUESTIONS INVOLVED

We have considered the possible argument that a corporation which is a creature of the so-called "Soviet Republics" has no such legal existence as to enable it to sue in any court in this country, but have come to the conclusion that this contention can not be made upon the present state of the record.

Nothing in the petition itself shows that the petitioner is a creature of the so-called "Soviet Republics." The only allegation in the petition as to its status is that it is "a corporation duly organized under, and by virtue of, the Laws of Russia." (R. 7.) The petition also shows that it existed under the Imperial Government of Russia and that the property was seized from it during the sway of the Provisional Government. The Court of Appeals of New York has held, in a well-considered opinion, that such a corporation has a legal existence and can sue in the courts of that State. *Petrogradsky M. K. Bank* v. *National City Bank*, 253 N. Y. 23. It has been held that a suit may be maintained on behalf of the "State of Russia" although the United States has recognized no government in Russia since the Kerensky Government and that government has been overthrown. *Lehigh Valley R. Co.* v. *State of Russia*, 21 F. (2d) ~~406~~ 396 (C. C.

A. 2d), certiorari denied, 275 U. S. 571. And the United States recently brought a suit against the Russian Volunteer Fleet in a Federal District Court. No question seems to have been raised by the court as to the possibility of suing that corporation. *United States* v. *Russian Volunteer Fleet,* 22 F. (2d) 187.

Inasmuch as the proceedings in the Court of Claims did not reach a point where any findings of fact were made, it can not be assumed, on the present record, that the petitioner has no corporate existence.

The only indication in the record to the contrary is the quotation from the petitioner's brief in the opinion of the Court of Claims. (R. 35; pp. 3–4, *supra.*) Even if this Court should feel that this can be considered as qualifying or explaining the allegation in the petition, it is inconclusive.

After the reception of evidence the Court of Claims may find that the corporate existence of the plaintiff can not be recognized in our courts or that the suit is prosecuted by persons having no authority to represent the Russian Volunteer Fleet which can be accepted in our courts, but we do not think that these questions can be determined on the allegations of the petition alone.

In taking the position which we have indicated in this brief, we wish to make it clear that we are not conceding that the suit in the Court of Claims should succeed or that it will be necessary for that court to go into the question of compensation due

on account of the requisitioning of the contracts and ships involved.

CONCLUSION

Although we do not confess error, we are unable to support the construction of the Act of June 15, 1917, upon the basis of which the Court of Claims dismissed the case. If our view is correct, it would follow that the judgment below should be reversed, but we submit that the Government should have an opportunity to raise by proper motions or answer all questions relating to the right of the petitioner to bring suit and the right of the persons in charge of the case to proceed with its prosecution.

Respectfully submitted.

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DECEMBER, 1930.

APPENDIX A

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fifth Amendment to the Constitution, provides, in part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Judicial Code, Section 145 (U. S. C., Title 28, Section 250), provides in part:

> SEC. 145. The Court of Claims shall have jurisdiction to hear and determine the following matters:
>
> First. All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an Executive Department, upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable: * * *.

Judicial Code, Section 155 (U. S. C., Title 28, Section 261), provides:

> SEC. 155. Aliens who are citizens or subjects of any government which accords to citizens of the United States the right to prosecute claims against such government in

its courts, shall have the privilege of prosecuting claims against the United States in the Court of Claims, whereof such court, by reason of their subject-matter and character, might take jurisdiction.

The Act of June 15, 1917, c. 29, 40 Stat. 182, 183, provides in part:

> Whenever the United States shall cancel, modify, suspend or requisition any contract, make use of, assume, occupy, requisition, acquire or take over any plant or part thereof, or any ship, charter, or material, in accordance with the provisions hereof, it shall make just compensation therefor, to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code.

APPENDIX B

DEPARTMENT OF STATE,
Washington, December 5, 1930.

In reply refer to EE 861.01.

The Honorable The ATTORNEY GENERAL.

SIR: I have the honor to inform you, in response to a request made by Mr. Claude R. Branch, that the Provisional Government of Russia, the successor of the Imperial Government of Russia, was recognized by the Government of the United States on March 22, 1917. The Provisional Government of Russia was the last Government of Russia recognized by the Government of the United States.

According to the Department's information, the Provisional Government of Russia was overthrown by an armed uprising which took place in the early part of November, 1917. The Government of the United States has not extended recognition to any régime established in Russia subsequent to the overthrow of the Provisional Government.

Very truly yours,

(Sgd.) HENRY L. STIMSON.

U. S. GOVERNMENT PRINTING OFFICE: 1930